

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO

PAUL THOMAS WILKINSON, II, a minor, by and)	
through JOYCE RAE FENDALL WILKINSON, his)	
mother, natural guardian and next friend; and JOYCE)	Case No. C-1-01288
RAE FENDALL WILKINSON, individually,)	
)	Judge Beckwith
Plaintiffs,)	Magistrate Black
)	
vs.)	
)	
KATHRYN JEAN FAULEY, M.D.; MARY A.)	
HANEBERG MERLING, M.D.; and CLINTON)	
MEMORIAL HOSPITAL,)	
)	
Defendants.)	
)	

**PLAINTIFF'S MOTION FOR LEAVE TO AMEND
THE COMPLAINT AND CAPTION TO NOTE A CHANGE
IN CAPACITY AND TO ADD A WRONGFUL DEATH CLAIM
AND PLAINTIFF'S SUPPORTIVE MEMORANDUM**

COMES NOW plaintiff Joyce Rae Fendall Wilkinson and moves this Court for an order granting her leave to amend the caption and complaint to note her change in capacity from mother, natural guardian and friend of Paul Thomas Wilkinson, to her being the personal representative and administratrix of his estate in order to pursue his personal injury action as a survival action and to pursue a wrongful death claim. In support, plaintiff offers the following Memorandum and Brief.

Respectfully submitted,

/s/ Anne M. Hull

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MEMORANDUM AND BRIEF

Nature of the Case

This is a medical malpractice action. This court's jurisdiction is premised on diversity of citizenship. On May 10, 2001, plaintiff filed this action to pursue obstetrical, neonatal and hospital malpractice claims relating to the birth and neonatal care of her son, Paul Thomas Wilkinson. On January 4, 2004, the minor died. On April 27, 2004, Plaintiff Joyce Wilkinson was appointed personal representative of his estate and given letters of administration.

The Issue

Whether plaintiff may be granted leave to amend the complaint to note her change in capacity from Paul Wilkinson's mother, natural guardian and next friend to her being the personal representative and administratrix of his estate, so that she may pursue a survival claim and wrongful death claim.

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Introduction: Defendants Do not Oppose Plaintiff's Motion

Pursuant to S.D. Ohio Civ. R. 7.3(a)(b), counsel for plaintiff conferred with counsel for defendants Fauley, Merling and Clinton Memorial Hospital to seek their respective positions as to this motion. All counsel advised they did not oppose plaintiff's motion and further advised they would file no responsive memoranda in opposition. Accordingly, plaintiff submits herewith a proposed Agreed Order for the Court's review and also submits a proposed amended Complaint.

The Law Governing Leave to Amend

Only when a proposed amendment is frivolous, dilatory, advances a claim or defense that is legally insufficient, or is prejudicial or futile, may the trial court deny leave to amend. *Forman v. Davis*, 371 U.S. 178, 182 (1962) (holding that the futility of amendment may be a basis for refusing to grant leave to amend). Generally, the Sixth Circuit is very liberal in permitting amendments. *U.S. ex rel. American Textile Mfrs. Institute*, 179 F.R.D. 541, 550 (S. D. Ohio 1998). An order denying a Fed.R.C.iv.Pro.15(a) motion to amend is reviewed for abuse of discretion. *General Elec. Co. v. Sargent & Lundy*, 916 F.2d 1119, 1130 (6th. Cir. 1990).

Plaintiff's motion is the type contemplated with the above liberality. The trial is scheduled for November 2004. All parties have had informal notice of the minor's death and have understood the plaintiff would file the instant motion after his estate was opened and a personal representative was appointed. The defendants offer no opposition and there is no prejudice to the defendants.

Further, in addition to asserting a wrongful death claim, plaintiff's proposed amended complaint helps to narrow the issues for trial. In the proposed pleading, plaintiff has abandoned her spoliation of evidence, negligence per se, informed consent, and punitive damage claims. She is proceeding under pure negligence claims to support the survival and wrongful death claims.

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Conclusion

WHEREFORE, plaintiff prays that the Court grant her motion for leave to file the proposed Amended Complaint and for such other relief as the Court deems just and proper.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the 6th day of July, 2004, I presented the foregoing to the clerk of the court for filing and uploading to the CM/ECF system which will send a notice of electronic filing to the following:

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